tions heard by court and jury, judgment was entered against him for certain claims, and he brings error. Affirmed.

C. E. Nicol, of Alexandria, and *Allen L. Oliver,* of Cape Girardeau, Mo., for plaintiff in error.

H. Thornton Davies, of Manassas, for defendant in error.

VIRGINIA IRON, COAL & COKE CO. *v.* GRAHAM et al.

March 13, 1919.

[98 S. E. 659.]

1. Contracts (§ 309 (1, 2*)—Impossibility of Performance—Destruction of Subject-Matter.—If one makes contract which is in itself possible, he will be liable for a breach, notwithstanding it is beyond his power to perform, but where it is apparent that parties contracted on basis of continued existence of substance to which contract related, a condition is implied that if performance becomes impossible because that substance does not exist, this will excuse performance.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 434 et seq.]

2. Mines and Minerals (§ 70 (3)*)—Royalties under Lease—Exhaustion of Ore.—A 40-year mining lease, providing compensation to lessor "for each ton of good merchantable ore mined and shipped * * * not less than 20,000 tons to be shipped each year," held not to contemplate that lessee should be bound when ore was exhausted.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 711.]

3. Cancellation of Instruments (§ 4*)—Grounds—Mistake of Fact.—Relief may be had in equity for the cancellation or rescission of a contract if mistake of fact affects its very substance and is not a mere incident or inducement for entering into it.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 888.]

4. Contracts (§ 93 (5)—Validity—Mistake of Fact.—If certain facts are assumed by both parties as basis of a contract, and it subsequently appears that such facts did not exist, the contract is inoperative.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 861.]

5. Cancellation of Instruments (§ 13*)—Grounds—Defense at Law.—Although a lessee of a mine could have set up in action for royalties or rent failure of consideration due to mistake of fact as to amount of ore, it was under no obligation to wait institution of such an action, but could resort to equity for cancellation of lease, where existence of lease and possibility of having to assume liabil-

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

ities thereby imposed constituted a contingent liability, tendency of which would be to impair its credit, especially where rights of trustees and bondholders were involved.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 882.]

6. Cancellation of Instruments (§ 4*)—Grounds—Failure of Consideration.—Failure of consideration is a ground of equity jurisdiction.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 891.]

7. Equity (§ 46*)—Jurisdiction—Adequacy of Remedy at Law.—In order to justify court of equity in refusing to take jurisdiction, remedy at law must be adequate, and must attain the full end and justice of case, reaching whole mischief and securing whole right of party in a perfect manner at present time and in future.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 169.]

Appeal from Corporation Court of Roanoke.

Suit by the Virginia Iron, Coal & Coke Company against Nannie M. Graham and others. From a decree for defendants, plaintiff appeals. Reversed and remanded.

W. B. Kegley, of Wytheville, and *Jackson & Henson* and *D. D. Hull, Jr.,* all of Roanoke, for appellant.

Stuart B. Campbell and *Robert Sayers,* both of Wytheville, and *Waller R. Staples,* of Roanoke, for appellees.

GLIDEWELL *v.* MURRAY-LACY & CO. et al.

March 13, 1919.

[98 S. E. 665.]

1. Process (§ 168*)—"Abuse of Process"—Cause of Action.—"Abuse of process," as distinguished from malicious prosecution and from false imprisonment, constitutes an independent cause of action.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Abuse of Process.]

2. Process (§ 168*)—"Abuse of Process."—The distinctive nature of an action for "abuse of process," as compared with actions for malicious prosecution and false imprisonment, is that it lies for the improper use of a regularly issued process, not for maliciously causing process to issue, or for an unlawful retention of the person.

3. Process (§ 171*)—Abuse—Alleging and Proving Malice.—In action for abuse of process, it is not necessary to allege or prove

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.